

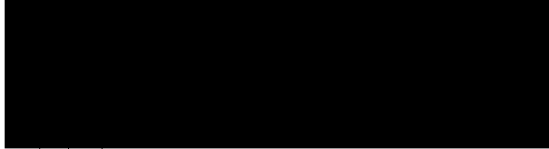


U.S. Department of Justice

Immigration and Naturalization Service

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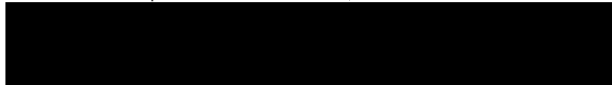
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC-98-068-52371 Office: California Service Center Date:

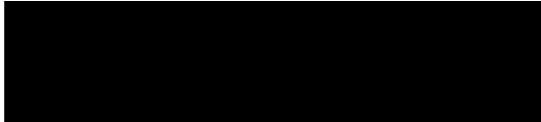
SEP 25 2000

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

Terrence M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a California corporation that claims to be engaged in international trade and investment. The petitioner further claims to be a subsidiary of [REDACTED]

[REDACTED] located in the [REDACTED]. The petitioner seeks to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), to serve as the president. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity or that it had the ability to pay the proffered wage.

On appeal, counsel argues that the beneficiary is eligible for the benefit sought.

The first issue to be examined is whether the beneficiary will be performing managerial or executive duties.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

In a letter dated November 8, 1997, the petitioner listed the beneficiary's duties as follows:

manage and organize all aspects of the company; make personnel decisions, including the hiring and firing of managers, supervisors, and employees; establish and implement company development and expansion plans; exercise discretion over day-to-day company operations; negotiate business transactions and sign contracts on behalf of the company; formulate appropriate courses of company actions; and determine further measures to be taken to promote business and advance the company's goodwill.

The petitioner submitted its "Organization Chart" which indicated there was one individual (the vice president) who reported to the beneficiary; two individuals (one of whom was "projected") who reported to the vice president; and four individuals (two of whom were "projected") who reported to the two previously-mentioned individuals.

On May 18, 1998, the director requested that the petitioner submit additional information. In response, the petitioner reiterated the beneficiary's proposed duties and stated that "due to increased

competition and growth of business, we need the beneficiary to come to the U.S. to work as soon as possible." The petitioner submitted photocopies of its Forms DE-6, Quarterly Wage and Withholding Report, for the quarters ending December 31, 1997 and March 31, 1998. According to these reports, the petitioner had two full-time and two part-time employees during these reporting periods.

The director determined that the petitioner had not established a need for the beneficiary and denied the petition. On appeal, counsel argues that "the nature of [the petitioner's] business is such that [the beneficiary] will involve in business functions that require a high degree of sophistication." Counsel's argument is not persuasive. The record is not convincing in demonstrating that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing nonqualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

The next issue to be examined is whether the petitioner has the ability to pay the proffered wage.

8 C.F.R. 204.5(g) (2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage . . . Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner indicated that the beneficiary will receive an annual salary of \$36,000.00. The petitioner submitted a balance sheet for its finances as of October 31, 1997. This balance sheet was not audited; however, it is noted that this balance sheet indicated a cash deficit of \$309.63. On May 18, 1998, the director requested that the petitioner submit additional information. In response, the petitioner submitted a photocopy of its Internal Revenue Service Form 1120, U.S. Corporation Income Tax Return, for the year 1997. According to this return, the petitioner had a taxable income of \$27,465.00. Further, Schedule L of this return indicated that the petitioner had a cash deficit of \$863.00. The

petitioner also submitted a photocopied profit and loss statement for the foreign-based company and photocopied receipts of monetary wire transfers from the foreign-based company to the petitioner. Also, the petitioner submitted photocopied bank statements which indicate that the petitioner did receive large sums of money through wire transfers. These bank statements also indicate that the petitioner drafted checks for large sums of money. On appeal, counsel states that "the China parent company has been, and will continue to support the U.S. subsidiary financially Therefore, the petitioner has the ability to pay the proffered wages." Counsel's argument is unpersuasive. The evidence submitted in support of this petition does not establish the petitioner's ability to pay the beneficiary an annual salary of \$36,000.00. The petitioner's tax returns do not document that the petitioner has sufficient cash to support the beneficiary's proposed salary. Also, the bank statements and wire transfers are not acceptable. These documents may demonstrate that the foreign-based company has been transferring money to the petitioner; however, they do not indicate what debts the petitioner is obliged to pay. Also, the profit and loss statement for the foreign-based company is not supported by any independent, documentary evidence and has not been audited. Accordingly, the petitioner has not established its ability to pay the proffered wage in accordance with 8 C.F.R. 204.5(g)(2).

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.